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Selvam a/l Arjunan v Public Prosecutor

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COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO W-05–29 OF 2010
ABDUL MALIK ISHAK, CLEMENT SKINNER AND AZIAH ALI JJCA
29 MARCH 2012

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Criminal Law — Dangerous Drugs Act 1952 — s 39B(1)(a) — Trafficking in 57.20g of heroin and 23.4g of monoacetylmorphines — Convicted and sentenced to death — Appeal against — Whether trial judge erred in finding appellant had possession of drugs and necessary knowledge of it — Whether appellant succeeded in casting reasonable doubt on prosecution's case to warrant acquittal

D

Evidence — Witness — Prosecution's case hinged on evidence of police officer — No supportive evidence from other members of raiding party — Whether 'testis unus testis nullus' (one witness is no witness) rule applies in present case — Whether evidence of police officer required corroboration

E

The appellant was convicted for trafficking in dangerous drugs, to wit, 80.6g (57.20g of heroin and 23.4g of monoacetylmorphines) and was sentenced to death by the High Court. In this case, the appellant who rode the Modenas motorcycle WLF 6303 slowly at Jalan Sehala heading towards Jalan Perhentian had attempted to accelerate and flee the scene when SP2 identified himself as 'police'. In his attempt to escape, the appellant put up a struggle but was eventually subdued and placed under arrest. In the carrier basket of the motorcycle ridden by the appellant, SP2 found a black bag containing a red plastic package. Inside the red plastic package, SP2 found three newspaper wrappings and inside each newspaper wrappings was a transparent plastic packet containing incriminating exhibits which SP4, government chemist, confirmed were the dangerous drugs. In his defence, the appellant contended, inter alia, that the motorcycle and the drugs that were found in the carrier basket of the motorcycle belonged to Ulaganathan. Efforts to trace Ulaganathan however, proved futile. The learned trial judge concluded that the appellant had failed to raise a reasonable doubt in the prosecution's case and the appellant also failed to rebut the presumption of trafficking under s 37(da) of the Dangerous Drugs Act 1952 ('DDA') on the balance of probabilities. It was safe to convict the appellant. In this appeal, the appellant submitted that the trial judge had erred both in law and on the facts when the learned judge held that the prosecution had succeeded in establishing a prima facie case notwithstanding the fact that the prosecution witnesses were not credible and there were doubts surrounding their evidence.

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Held, dismissing the appeal, affirming the conviction and sentence on the appellant:

(1) Knowledge of possession could be inferred from the act of struggling in order to flee and abscond from the arms of the law. The overt acts of the appellant in attempting to accelerate the Modenas motorcycle in an attempt to escape and the struggle to flee were circumstances that suggested a nexus between the appellant's conduct and the offence of trafficking. Such conduct was certainly admissible under s 8 of the Evidence Act 1950 (see para 25).

(2) The rule where one witness is said to be no witness could not apply in the present appeal. The latin phrase 'testis unus testis nullus' (one witness is no witness) cannot be applied to all cases. The testimony of one credible witness outweighs the testimony of other witnesses who are not credible enough. SP2 was a witness that was not required to be corroborated at law. SP2 was not a child witness nor was he an accomplice and he was also not a victim of a sexual offence. SP2 was a police officer and his evidence could stand alone. The High Court saw SP2 giving his evidence and there was no rule of law that a court cannot convict a person based on the evidence of one witness only (see paras 26–27).

(3) The High Court would be in a far better position to weigh in a balance the trustworthiness of the prosecution witnesses bearing in mind that the learned judicial commissioner having conduct of the trial had the opportunity of observing the demeanor of the prosecution witnesses. In any criminal trial, discrepancies will always be found in the evidence of any witnesses and this is quite common in our adversarial system. In a situation of this nature, the duty of the trial judge is to determine whether these discrepancies are minor or material. It is entirely within the domain of the trial judge to assess the credibility of each witness and arrive at a finding whether the evidence of a witness is to be believed or disbelieved. The trial judge too is empowered to determine which part of the evidence of a witness is to be accepted or rejected. Seen in this context, this court was convinced that the learned JC was right and thus, not inclined to substitute the findings of the learned JC (see para 48).

(4) There were no errors made by the learned JC. He had held that the appellant had actual possession of the drugs and so the compelling provision of s 37(da) of the DDA was invoked. The learned JC analysed the defence case and came to the conclusion that the appellant had failed to raise a reasonable doubt in the prosecution's case and the appellant also failed to rebut the presumption of trafficking under s 37(da) of the DDA on the balance of probabilities. It was safe to convict the appellant (see para 55).

[Bahasa Malaysia summary

Perayu didapati bersalah kerana mengedar dadah berbahaya, iaitu, 80.6g (57.20g heroin dan 23.4g monoacetylmorphines) dan dijatuhkan hukuman mati oleh Mahkamah Tinggi. Dalam kes ini, perayu yang menunggang motosikal Modenas WLF 6303 perlahan-lahan di Jalan Sehala menuju ke arah Jalan Perhentian telah cuba untuk memecut dan melarikan diri dari tempat kejadian apabila SP2 memperkenalkan dirinya sebagai 'polis'. Dalam cubaan untuk melarikan diri, perayu telah bergelut tetapi akhirnya tewas dan diletakkan dalam tahanan. Dalam bakul motosikal yang ditunggang oleh perayu, SP2 menjumpai sebuah beg hitam yang mengandungi bungkusan plastik merah. Di dalam bungkusan plastik merah tersebut, SP2 menjumpai tiga bungkusan akhbar dan di dalam setiap bungkusan akhbar tersebut adalah paket plastik lutsinar yang mengandungi ekshibit terbabit yang disahkan oleh SP4, ahli kimia kerajaan, sebagai dadah berbahaya. Dalam pembelaannya, perayu menghujahkan, antara lain, bahawa motosikal dan dadah-dadah yang ditemui di dalam bakul motosikal adalah milik Ulaganathan. Usaha untuk mengesan Ulaganathan walau bagaimanapun, gagal. Yang arif hakim bicara menyimpulkan bahawa perayu telah gagal untuk menimbulkan keraguan munasabah dalam kes pendakwaan dan perayu juga gagal untuk menangkis andaian pengedaran di bawah s 37(da) Akta Dadah Berbahaya 1952 pada imbangan kebarangkalian. Adalah selamat untuk mensabitkan perayu. Dalam rayuan ini, perayu menghujahkan bahawa hakim bicara telah terkhilaf dalam undang-undang dan fakta apabila beliau memutuskan bahawa pihak pendakwaan telah berjaya mewujudkan kes prima facie tanpa mengambil kira fakta bahawa saksi-saksi pendakwaan tidak boleh dipercayai dan terdapat keraguan pada keterangan mereka.

Diputuskan, menolak rayuan, mengesahkan sabitan dan hukuman ke atas perayu:

(1) Pengetahuan pemilikan boleh disimpulkan daripada perlakuan bergelut untuk melarikan dan melepaskan diri dari cengkaman undang-undang. Perbuatan perayu yang terang-terangan cuba untuk memecut motosikal Modenas sebagai percubaan untuk melarikan diri dan pergelutan untuk melepaskan diri adalah hal keadaan yang mencadangkan pertalian antara tingkah laku dan kesalahan mengedar. Perlakuan sedemikian sememangnya diterima di bawah s 8 Akta Keterangan 1950 (lihat perenggan 25).

(2) Kaedah di mana seorang saksi dikatakan sebagai bukan saksi tidak terpakai dalam rayuan ini. Frasa latin 'testis unus testis nullus' (seorang saksi bukan saksi) tidak boleh diguna pakai ke atas semua kes. Keterangan lisan seorang saksi yang boleh dipercayai melebihi keterangan saksi-saksi lain yang tidak boleh dipercayai secukupnya. SP2 adalah saksi yang tidak perlu disokong di sisi undang-undang. SP2 bukan seorang saksi kanak-kanak mahupun rakan jenayah dan beliau juga

bukan mangsa kesalahan seksual. SP2 adalah seorang pegawai polis dan keterangannya boleh berdiri dengan sendiri. Mahkamah Tinggi melihat SP2 memberi keterangannya dan tiada kaedah undang-undang bahawa mahkamah tidak boleh mensabitkan seseorang berdasarkan keterangan seorang saksi sahaja (lihat perenggan 26–27).

(3) Mahkamah Tinggi akan berada dalam kedudukan yang jauh lebih baik untuk mempertimbangkan dalam imbangan kebolehpercayaan saksi-saksi pendakwaan dengan peringatan bahawa pesuruhjaya kehakiman ('PK') setelah menjalankan perbicaraan, berpeluang memerhatikan tingkah laku saksi-saksi pendakwaan. Dalam mana-mana perbicaraan jenayah, percanggahan akan sentiasa dijumpai dalam keterangan yang diberikan oleh mana-mana saksi dan ini lazim dalam sistem adversarial. Dalam keadaan sebegini, kewajipan hakim bicara adalah untuk menentukan sama ada perbezaan ini adalah kecil atau bahan. Ia adalah sepenuhnya dalam lingkungan hakim bicara untuk menilai kredibiliti setiap saksi dan membuat suatu dapatan sama ada keterangan seorang saksi boleh dipercayai atau tidak. Hakim bicara juga diberi kuasa untuk menentukan yang bahagian mana dalam keterangan seseorang saksi yang boleh diterima atau ditolak. Dilihat dalam konteks ini, mahkamah yakin bahawa PK adalah tepat dan dengan itu, tidak cenderung untuk menggantikan dapatan-dapatan PK (lihat perenggan 48).

(4) Tiada kesilapan yang dibuat oleh PK. Beliau telah memutuskan bahawa perayu mempunyai milikan sebenar dadah-dadah tersebut dan peruntukan s 37(da) ADB yang memaksa telah dibangkitkan. PK telah menganalisa kes pembelaan dan menyimpulkan bahawa perayu telah gagal untuk menimbulkan keraguan munasabah dalam kes pendakwaan dan perayu juga gagal untuk menangkis anggapan pengedaran di bawah s 37(da) ADB atas imbangan kebarangkalian. Adalah selamat untuk mensabitkan perayu (lihat perenggan 55).]

Notes

For cases on s 39B(1)(a), see 4 *Mallal's Digest* (4th Ed, 2010 Reissue) paras 445–592.

For cases on witness in general, see 7(2) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 2955–3244.

Cases referred to

AEG Carapiet v AY Derderian AIR 1961 Calcutta 359 (refd)
Badri v State of Rajasthan [1976] 1 SCC 442 (refd)
Balachandran v PP [2005] 2 MLJ 301; [2005] 1 CLJ 85, FC (refd)
Chan Kwok Keung & Anor v The Queen [1990] 3 CLJ (Rep) 386, CA (refd)
Dato Mokhtar bin Hashim & Anor v PP [1983] 2 MLJ 232; [1983] CLJ (Rep) 101, FC (refd)

A *Ho Seng Seng v Rex* [1951] MLJ 225 (refd)
Leow Nghee Lim v Reg [1956] MLJ 28 (refd)
Long bin Samat & Ors v PP [1974] 2 MLJ 152, FC (refd)
Looi Kow Chai & Anor v PP [2003] 2 MLJ 65; [2003] 2 AMR 89, CA (refd)
MGG Pillai v Tan Sri Dato Vincent Tan Chee Yioun & other appeals [1995] 2
B MLJ 493, CA (refd)
Muhammed bin Hassan v PP [1998] 2 MLJ 273, FC (refd)
Muniandy & Ors v PP [1966] 1 MLJ 257, FC (refd)
Parlan bin Dadeh v PP [2008] 6 MLJ 19; [2009] 1 CLJ 717, FC (refd)
Pendakwa Raya lwn Koh Poay Khoon [1993] MLJU 61; [1993] 3 CLJ 223, HC
C (refd)
Pendakwa Raya lwn Muhd Zulkifli Abd Ghani & Satu Lagi [2010] MLJU 1744; [2011] 2 CLJ 772, CA (refd)
PP v Abdul Rahman bin Akif [2007] 5 MLJ 1; [2007] 4 CLJ 337, FC (refd)
PP v Badrulsham bin Baharom [1988] 2 MLJ 585 (refd)
D *PP v Chia Leong Foo* [2000] 6 MLJ 705; [2000] 4 CLJ 649, HC (refd)
PP v Datuk Haji Harun bin Haji Idris (No 2) [1977] 1 MLJ 15 (refd)
R v Wood Green Crown Court, ex parte Taylor [1995] Crim LR 879 (folld)
San Soo Ha v PP [1968] 1 MLJ 34 (refd)
Warner v Metropolitan Police Commissioner [1968] 2 All ER 356, HL (refd)
E *Zulfikar bin Mustaffah v PP* [2001] 1 SLR 633, CA (folld)

Legislation referred to

Criminal Procedure Code s 180(1)
Dangerous Drugs Act 1952 ss 2, 37(da), 37A, 39B(1)(a), (2)
F Evidence Act 1950 ss 8, 134

Appeal from: Criminal Trial No 45–59 of 2005 (High Court, Kuala Lumpur)

Rajpal Singh (Rajpal Firah & Vishnu) for the appellant.
Shoba Venu Gobal (Deputy Public Prosecutor, Attorney General's Chambers) for
G *the respondent.*

Abdul Malik Ishak JCA (delivering judgment of the court):

INTRODUCTION

H

[1] The appellant was charged for trafficking in dangerous drugs, to wit, 80.6g (57.20g of heroin and 23.4g of monoacetylmorphines) before the High Court and the charge was worded as follows:

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> Bahawa kamu pada 29 September 2004 jam lebih kurang 6.00 petang di Jalan Sehala di hadapan Restoran Jade Garden, Off Jalan Perhentian, Jalan Ipoh, di dalam daerah Sentul, di dalam Wilayah Persekutuan Kuala Lumpur telah mengedar dadah berbahaya iaitu sejumlah berat 80.6 gram (57.20 gram heroin dan 23.4 gram monoacetylmorphines) dan dengan itu kamu telah melakukan satu

kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 yang boleh dihukum di bawah seksyen 39B(2) Akta yang sama.

[2] At the close of the prosecution's case, the High Court subjected the prosecution's evidence to a maximum evaluation and found that a prima facie case was established (s 180(1) of the Criminal Procedure Code ('CPC'); *Looi Kow Chai & Anor v Public Prosecutor* [2003] 2 MLJ 65; [2003] 2 AMR 89 (CA); and *Balachandran v Public Prosecutor* [2005] 2 MLJ 301; [2005] 1 CLJ 85 (FC)) against the appellant for trafficking in the dangerous drugs as per the charge, an offence under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('DDA') and punishable under s 39B(2) of the DDA.

[3] Accordingly, the High Court called for the defence of the appellant as per the charge. The appellant gave evidence under oath and he called two other witnesses, namely:

(a) Kalisperan a/l Marimuthu (SD2); and

(b) Saravanan a/l Perumal (SD3).

[4] At the close of the defence case, the High Court found the appellant guilty as per the charge and convicted him accordingly. The appellant was sentenced to death by the High Court. Aggrieved, he now appeals to this court.

THE FACTS

[5] On 29 September 2004 at about 6pm, acting on information received, a team of twelve (12) police personnel headed by ASP Rajab Ahad bin Ismail (SP2) from the narcotics division of the police headquarters in Kuala Lumpur proceeded to the place as mentioned in the charge. On arrival at the scene, SP2 divided his police party into three groups. The first group waited at the Jade Garden Restaurant. The second group waited by the side of Jalan Perhentian while the third group waited at the end of Jalan Sehala off Jalan Perhentian. The three groups were located close to one another.

[6] The police party waited for about an hour. SP2 then saw a Modenas motorcycle bearing registration No WLF 6303 ridden by the appellant alone proceeding towards the direction of the three groups of police personnel. The appellant rode the motorcycle slowly and he was from Jalan Sehala heading towards Jalan Perhentian. SP2, who was located at the restaurant, observed the said motorcycle for about 30 seconds from a distance of about 20 metres. SP2 observed that at that point of time there was no other vehicle plying along that

road except the motorcycle ridden by the appellant. With the assistance of SubInspector Teoh, Lance Corporal Faizal and Lance Corporal Nazri, SP2 rushed towards the appellant.

[7] The appellant attempted to accelerate and flee when SP2 identified himself as 'police' but the appellant's attempts failed. The appellant put up a struggle in order to escape but he was eventually subdued and placed under arrest. After the appellant was arrested, SP2 read the caution under s 37A of the DDA to the appellant. The appellant remained quiet.

[8] SP2 examined the appellant physically but nothing incriminating was found. In the carrier basket of the motorcycle ridden by the appellant, SP2 found a black bag (exh 'P13') containing a red plastic package (exh 'P14'). Inside the red plastic package (exh 'P14'), SP2 found three newspaper wrappers (exh 'P17', 'P20' and 'P23') and inside each newspaper wrapper was a transparent plastic packet containing heroin (exhs 'P16', 'P19' and 'P22'). All these exhibits were examined by SP2 in the presence of the appellant.

[9] SP2 also seized from the appellant the following items:

(a) one handphone (exh 'P27');

(b) cash RM4,320 (itemised in the handing over list (*borang serah menyerah*) and marked as exh 'P8' therein);

(c) one motorcycle WLF 6303 (exh 'P28');

(d) the motorcycle's keys (exhs 'P28A–D');

(e) one helmet (exh 'P30'); and

(f) a bunch of keys (exhs 'P29A–I').

[10] All the exhibits together with the appellant were brought back to the police station and handed over to the investigating officer (SP6). SP6 investigated and found that the motorcycle WLF 6303 belonged to an Indian man by the name of Ulaganathan a/l Palatiandhi ('Ulaganathan') with an address at Rumah Setinggan Hospital at Jalan Belakang Hospital Bandar Tun Razak, Cheras. SP6 also went to Ulaganathan's house at the said address on two occasions but failed to meet him. SP6 only met Ulaganathan's mother by the name of Walupayi and according to her Ulaganathan no longer returned home. Investigations to trace Ulaganathan through Jabatan Pendaftaran Negara proved futile. Concerted attempts by police detectives to trace Ulaganathan were fruitless. It came to a dead end.

[11] The evidence of the government chemist (SP4) confirmed that the incriminating exhibits were dangerous drugs weighing 80.6g (57.20g heroin

and 23.4g monoacetylmorphines) within the meaning of s 2 of the DDA.

THE DEFENCE

[12] In his defence the appellant testified that on 28 September 2004 at about 8.30pm, SD2 contacted him and requested to borrow RM4,000 to pay for SD2's arrears of car instalments.

[13] On 29 September 2004, the appellant met his employer (SD3) for the purpose of borrowing RM4,000 as requested by SD2. SD3 obliged and gave the appellant the money and at the same time directed the appellant to proceed to Plaza Pekeliling at Jalan Ipoh, Sentul to see some scrap metal. Thereafter the appellant contacted SD2 who told him to meet SD2 at an Indian foodstall next to the cinema at Sentul which was the place where the offence was committed.

[14] The appellant waited for a taxi opposite the Sentul police station near to Plaza Pekeliling and by coincidence he met Ulaganathan who was riding a motorcycle at that time. Ulaganathan stopped his motorcycle and the appellant rode pillion after asking Ulaganathan to send the appellant to the place where SD2 was waiting.

[15] It must be borne in mind that according to the appellant, he met Ulaganathan by chance there and by coincidence too Ulaganathan wanted to buy some flowers in that vicinity.

[16] From the flower shop, Ulaganathan sent the appellant to the foodstall where SD2 was waiting and upon arrival, the appellant alighted from the motorcycle and he saw SD2 waiting at the foodstall and waving his hand towards the appellant. At that juncture, according to the appellant, he heard a loud noise and he saw Ulaganathan being chased by some unknown persons and he saw Ulaganathan throwing the crash helmet in the direction of those unknown persons and he also saw Ulaganathan running away from the scene.

[17] The appellant testified that he was shocked and that he saw three unknown persons who approached him and pushed him to the ground and handcuffed him in front of the Indian foodstalls. After the appellant was handcuffed and laid on the ground for five minutes, those unknown persons identified themselves as 'police'. The police personnel then escorted the appellant and took the bag from the carrier basket of the motorcycle and took the appellant in a 'jeep' motor vehicle and proceeded to the contingent police headquarters at Kuala Lumpur. The appellant testified that the motorcycle and the exhibits found in the carrier basket of the motorcycle belonged to Ulaganathan.

[18] SD2 testified that he is a good friend of the appellant and that he wanted to borrow RM4,000 from the appellant and that he promised to meet the appellant that evening at the scene of the crime. SD2 testified that he saw the appellant riding pillion on a motorcycle ridden by Ulaganathan arriving at the scene of the crime and he too saw the appellant talking to Ulaganathan while removing the crash helmet and alighting from the motorcycle. SD2 then saw the appellant approaching him and at the same time he heard a loud noise and saw a crash helmet being thrown and a few persons chased after Ulaganathan. SD2 also saw a few persons pushed the appellant to the ground and then they handcuffed the appellant. SD2 did not want to get involved because he saw those persons look like police personnel. According to SD2, about five minutes after the appellant was handcuffed, the appellant was taken to the Pajero motor vehicle and the said vehicle then left the scene. SD2 also saw two policemen took away the motorcycle. SD2 then telephoned SD3 — the appellant's employer, and told SD3 that the appellant was arrested and that SD2 did not know why the appellant was arrested.

[19] According to SD2, both he and SD3 went to Sentul police station and asked one of the police personnel there as to why the appellant was arrested and the police told them that it involved a big case and directed both SD2 and SD3 to go home. According to SD2, he did not give any statement to the police at the police station.

[20] SD3, the appellant's employer gave evidence. According to SD3, he was the one who loaned the sum of RM4,000 to the appellant and that was the sum that was seized by the police. SD3 also testified that he was the one who had directed the appellant to go to the scrap metal yard before the appellant proceeded to see SD2 at the scene of the crime.

ANALYSIS

[21] Possession requires the presence of the ingredient of knowledge as well as the ingredients of custody and control. Without possession, there can never be an offence of trafficking. Here, the High Court had made an affirmative finding of possession before it invoked the presumption of trafficking under s 37(da) of the DDA (*Muhammed bin Hassan v Public Prosecutor* [1998] 2 MLJ 273 (FC)).

[22] At pp 15–16 of the appeal record at *jilid* 1, the High Court had this to say:

(iii) Pemakaian anggapan mengedar s 37(da).

Jumlah dadah yang terlibat di dalam kes ini adalah seberat 80.6g ianya melebihi lima kali ganda dari keperluan anggapan mengedar di bawah s 37(da) dan ini sudah mencukupi untuk menggunapakai anggapan di bawah s 37(da) terpulang kepada tertuduh untuk mematahkan anggapan ini di atas beban imbangan kebarangkalian. Mahkamah Persekutuan di dalam kes *Public Prosecutor v Lim Hock Boon* [2009] 3 MLJ 604 menyatakan akan beban mematahkan anggapan di bawah s 37(da) Akta sebagai berikut:

> In the instant case, there was an express finding of actual possession by the learned trial judge and since the weight of the cannabis exceeded the trigger amount of 200g or more of the drug, he applied the presumption of trafficking under s 37(da) of the Act against the respondent. The failure of the respondent to even cast a reasonable doubt over the prosecution case, when in fact he had a heavier burden ie on the balance of probabilities to rebut the presumption of trafficking, meant that the respondent was rightly convicted by the High Court. With this kind of evidence before the court, the Court of Appeal ought to have found that the conviction was safe.

[23] The evidence of SP2 showed that the drugs were placed inside the transparent plastic packet which were wrapped in three newspaper wrappers which were in turn put inside a red plastic package (exh 'P14'). And exhibit 'P14' was placed inside a black bag (exh 'P13') which was found in the front carrier basket of the Modenas motorcycle ridden by the appellant. It must be borne in mind that SP2 observed the arrival of the Modenas motorcycle ridden solely by the appellant. And based on the evidence of SP2, the High Court rightly concluded that the appellant had custody and control of the drugs that were seized from the Modenas motorcycle (*Leow Nghee Lim v Reg* [1956] MLJ 28; and *Ho Seng Seng v Rex* [1951] MLJ 225).

[24] We have the evidence that at the material time, the appellant was riding the Modenas motorcycle alone and slowly and in a suspicious manner (*mencurigakan*). When the police party wanted to arrest the appellant, he tried to run away by attempting to accelerate the Modenas motorcycle but he was prevented from escaping. After a short struggle with the police party, the appellant was subdued and placed under arrest. This conduct of the appellant raised an inference that he knew what he was carrying in the front carrier basket of the Modenas motorcycle (*Parlan bin Dadeh v Public Prosecutor* [2008] 6 MLJ 19; [2009] 1 CLJ 717 (FC)).

[25] In our judgment, knowledge can be inferred from the act of struggling in order to flee and abscond from the arms of the law. The overt acts of the appellant in attempting to accelerate the Modenas motorcycle in an attempt to escape and the struggle to flee are circumstances suggesting a nexus between the appellant's conduct and the offence of trafficking. Such conduct is certainly

admissible under s 8 of the Evidence Act 1950 (*Chan Kwok Keung & Anor v The Queen* [1990] 3 CLJ (Rep) 386 (CA); and *Public Prosecutor v Chia Leong Foo* [2000] 6 MLJ 705; [2000] 4 CLJ 649).

[26] In regard to the complaint that the prosecution's case hinged on the evidence of SP2 without any supportive evidence from the other members of the raiding party, we have this to say. The rule where one witness is said to be no witness cannot apply in the present appeal. The latin phrase 'testis unus testis nullus' (one witness is no witness) cannot be applied to all cases. The High Court believed the evidence of SP2. The High Court saw SP2 giving his evidence and there is no rule of law that a court cannot convict based on the evidence of one witness only. It must be borne in mind that the testimony of one credible witness outweighs the testimony of other witnesses who are not credible enough. See *Balachandran v Public Prosecutor*.

[27] SP2 is a witness that is not required to be corroborated at law. SP2 is not a child witness nor is he an accomplice and he is also not a victim of a sexual offence. SP2 is a police officer and his evidence can stand alone. Solid as the rock of Gibraltar. Section 134 of the Evidence Act 1950 enacts that no particular number of witnesses shall in any case be required for the proof of any fact. Goswani J in *Badri v State of Rajasthan* [1976] 1 SCC 442, at p 447, made these pertinent observations:

> Since under the Evidence Act no particular number of witnesses are required for the proof of any fact, it is a sound and well-established rule of law that quality and not quantity of evidence matters. In each case the court has to consider whether it can be reasonably satisfied to act even upon the testimony of a single witness for the purpose of convicting a person.

[28] In *MGG Pillai v Tan Sri Dato Vincent Tan Chee Yioun & other appeals* [1995] 2 MLJ 493, Gopal Sri Ram JCA speaking for the Court of Appeal had this to say (see pp 519–520):

> In *Vadivelu Thevar v State of Madras* AIR 1957 SC 614, Sinha J, when delivering the unanimous decision of the Indian Supreme Court, drew attention to the material differences between English law on the subject and the law as enacted in s 134 of the Indian Evidence Act 1872 (which is identical to our s 134), and said at p 619:
>
> > The Indian legislature (and I might add the Malaysian Parliament) has not insisted on laying down any such exceptions to the general rule recognised in s 134 quoted above. The section enshrines the well-recognised maxim that 'evidence has to be weighed and not counted'. Our legislature has given statutory recognition to the fact that administration of justice may be hampered if a particular number of witnesses were to be insisted upon.

Again in *Ram August Tewari & Ors v Bindeshwari Tewari & Ors* AIR 1972 Pat 142, at p 144, the court made this important observation:

> The evidence of every witness is to be judged on its own merits and if there is nothing in his evidence or in the evidence of other witnesses examined in the case to discredit him, it cannot be disbelieved on the ground that there is only one witness on the point and no other witness has been examined to support him.

[29] What all these amount to is this. That the testimony of SP2 as a single witness, if believed, is sufficient to ground a conviction against the appellant (*Long bin Samat & Ors v Public Prosecutor* [1974] 2 MLJ 152 (FC)). The High Court believed SP2 and we see no reason to disagree.

[30] Be that as it may, it is argued that SP2 under examination-in-chief at p 8 of the appeal record testified that the first time that SP2 saw the motorcycle from where SP2 was located was about 20 metres away. Under cross-examination, SP2 stated at page 42 of the appeal record that it was about 25–30 metres away when SP2 first saw the motorcycle. Learned counsel for the appellant argues that these discrepancies are material. We beg to disagree. SP2 made an approximation of the distance when he said 'lebih kurang'. It is certainly impossible to be accurate.

[31] Learned counsel for the appellant makes reference to photograph 'B' at p 11 of the appeal record at *jilid* 2 and he points out that the registration number of the motorcycle is WLF 630. We have seen photograph 'B' as alluded to by learned counsel and we are of the considered view that the number plate is broken leaving out the last digit which is No 3. The charge does not mention the registration number of the motorcycle. But the handing over list (*borang serah menyerah*) marked as exh 'P8' as seen at p 9 of the appeal record lists down the registration number of the motorcycle as WLF 6303. It gives credence to the evidence of SP2. In his examination-in-chief, SP2 testified at p 8 of the appeal record that the registration number of the Modenas motorcycle is WLF 6303.

[32] In regard as to whether the stretch of the road as per the charge was busy or otherwise at the material time, learned counsel draws our attention to the evidence of SP2 at p 8 of the appeal record that reads, 'Dalam tempoh 30 saat itu tidak ada kenderaan lain lalulalang' (in that 30 seconds, there were no other vehicles plying on the road). Learned counsel then makes a comparison with the evidence of SP6 — the investigating officer. Under cross-examination, SP6 testified that he was not sure (*tidak pasti*) that 29 September 2004 (the date as per the charge) falls on a Wednesday. SP6 testified further at p 62 of the appeal record that, 'Semua orang ramai di situ tak kira hari apa, hari kerja pun sesak'

(there are a lot of people there no matter what day it is, on working days quite busy). By referring to us these passages, learned counsel seems to suggest that on the date of the offence that stretch of the road was busy not like what SP2 had testified. We venture to say that the roads in Kuala Lumpur are unpredictable. We can take judicial notice of the roads in Kuala Lumpur. Some days are busier than other days. SP6 was not part of the team led by SP2 on the date of the arrest. SP2's testimony was accepted by the High Court and that is what counts. On judicial notice, we now make reference to two text book writers. *Sir John Woodroffe & Syed Amir Ali's Law of Evidence*, (16th Ed), Vol 2, at p 1593 had this to say:

> Judicial notice, in such matters, takes the place of proof and is of equal force. In fact, as a means of establishing notorious and widely known facts it is superior to formal means of proof (*Onkar Nath v Delhi Administration,* 1977 Cr LJ 947, 949; AIR 1977 SC 1108; [1977] 2 SCC 611; [1977] SCC (Cri) 388).

[33] *Sarkar on Evidence*, (15th Ed), Reprint 2001, Vol 1, at p 998 had this to say:

> Judicial notice takes the place of proof, and is of equal force. As a means of establishing facts it is therefore superior to evidence (*Beardsley v Irving*, 81 Conn 489).

[34] Next, learned counsel for the appellant submits that SP2 did not prepare a search list and such failure puts the credibility of SP2 at stake. The value of a search list has been emphasised in the case of *Pendakwa Raya lwn Koh Poay Khoon* [1993] MLJU 61; [1993] 3 CLJ 223, at p 232. But what Raja Azlan Shah J (as His Majesty then was) said in *San Soo Ha v Public Prosecutor* [1968] 1 MLJ 34, at p 35 merits reproduction:

> The most that can be said about the failure to comply with the provision relating to search list is that it may cast doubt upon the bona fides of the parties conducting the search and accordingly afford ground for scrutiny; but if after close scrutiny the court arrives at the conclusion that the stolen articles were recovered from the possession of the accused person, it is obviously no defence to say that the evidence was obtained in an irregular manner. There is nothing in the law which makes such evidence inadmissible (see *Bashir Emperor* AIR 1932 All 185; *Bhattacharjee Emperor* AIR 1940 Cal 85). In the present case the learned president had explored the evidence and came to the conclusion that the stolen articles were recovered from the possession of the appellant. I am therefore unable to see how the failure to prepare a search list by itself would entitle the appellant to an acquittal.

[35] In our judgment, the absence of the search list is not fatal to the prosecution bearing in mind that the appellant was caught red handed with the drugs while riding the Modenas motorcycle alone on that fateful day.

[36] In regard to the non-tendering of the police report, we need only to refer to the case of *Balachandran v Public Prosecutor*, a decision of the Federal Court. There the Federal Court held at p 94 that, 'Where the evidence of a witness does not require to be corroborated in law there is no obligation to tender corroborative evidence to support his testimony'. Thus, there is no necessity to tender the arrest report in order to corroborate the evidence of SP2.

[37] Learned defence counsel argues that the black bag (exh 'P13') was zipped and therefore there was no way for the appellant to know the contents of the black bag. The same argument was advanced before the Federal Court in the case of *Public Prosecutor v Abdul Rahman bin Akif* [2007] 5 MLJ 1; [2007] 4 CLJ 337. At p 9 (MLJ); pp 349–350 (CLJ), the Federal Court had this to say:

> Therefore, the presence of the three packages in the car without a plausible explanation from the respondent could give rise to a strong inference that he had knowledge that the packages contained drug or things of similar nature (see also *Lim Beng Soon v Public Prosecutor* [2000] 4 SLR 589). We further agree with the prosecution that the fact that the drug was found wrapped in newspaper is no ground for saying that an inference could not be drawn against the respondent that he had the requisite knowledge. In this regard it is pertinent to refer to the observation of the Singapore Court of Appeal in *Zulfikar bin Mustaffah v Public Prosecutor* [2001] 1 SLR 633, at p 639:
>
> 21. For the element of 'possession' (within the meaning of s 17 of the Misuse of Drugs Act) to be established, it must not only be shown that the accused had physical control of the drugs at the relevant time; the prosecution must also prove that the accused possessed the requisite knowledge as to the contents of what he was carrying: see *Warner v Metropolitan Police Commissioner* [1969] 2 AC 256; *Tan Ah Tee & Anor v Public Prosecutor* [1978–1979] SLR 211; [1980] 1 MLJ 49. In the course of the appeal before us, counsel for the appellant relied heavily on the fact that the contents of the bundles were securely wrapped in newspapers and could not be identified. We were accordingly invited to draw the inference that the appellant had no knowledge of the contents of the bundles.
>
> 22. We were unable to accede to this request. While the fact that the contents of the bundles were hidden from view may have been relevant in determining whether the requisite knowledge was absent, this factor should still not be given too much weight. Otherwise, drug peddlers could escape liability simply by ensuring that any drugs coming into their possession are first securely sealed in opaque wrappings. Rather, the court must appraise the entire facts of the case to see if the accused's claim to ignorance is credible. As Yong Pung How CJ remarked in *Public Prosecutor v Hla Win* [1995] 2 SLR 424 (at p 438):
>
> In the end, the finding of the mental state of knowledge, or

A

> the rebuttal of it, is an inference to be drawn by a trial judge from all the facts and circumstances of the particular case, giving due weight to the credibility of the witnesses. (Emphasis added.)

B

[38] Likewise here, the fact that the drugs were found in the black bag (exh 'P13'), it cannot be argued that an inference could not be drawn against the appellant that he had the requisite knowledge.

C

[39] Now, the bouquet of flowers and the rain coat were placed on top of the black bag (exh 'P13') in the carrier basket of the motorcycle and this was used to bolster the argument that the appellant had no knowledge about the drugs in the black bag (exh 'P13'). This point was put across by way of cross-examination of SP2 and SP6 by the defence and both of them denied the

D

suggestions. And relying on *Zulfikar bin Mustaffah v Public Prosecutor* [2001] 1 SLR 633 (CA), at p 639, we categorically say that even though the black bag (exh 'P13') was covered by the bouquet of flowers and the rain coat, an inference could also be drawn against the appellant that he had the requisite knowledge about the drugs.

E

[40] But no cross-examinations were advanced by the defence in regard to the following matters:

F

(a) that the Modenas motorcycle fell to the ground in the course of arresting the appellant;

(b) that the bouquet of flowers also fell to the ground in the course of arresting the appellant; and

G

(c) that there was a florist selling flowers indicated by the appellant at point marked 'P' in the sketch plan.

[41] In our judgment, learned defence counsel is prevented from submitting to us those matters which were not put in cross-examinations of prosecution's witnesses. The Divisional Court in *R v Wood Green Crown Court, ex parte Taylor*

H

[1995] Crim LR 879, at p 880, advanced the following principle which must surely apply to this present appeal at hand:

> … a party who fails to cross-examine a witness upon a particular matter in respect of which it is intended to contradict him or impeach his credit by calling other witnesses tacitly accepts the truth of the witness's evidence in chief on the matter, and will not thereafter be entitled to invite the jury to disbelieve him in that regard. The proper course is to challenge the witness while he is in the witness-box or, at any rate, to make it plain to him at that stage that his evidence is not accepted (*Hart* (1932) 23 Cr App R 202).

I

[42] PB Mukharji J in *AEG Carapiet v AY Derderian* AIR 1961 Calcutta 359, at p 362, succinctly said the same thing in the following terms:

> The law is clear on the subject. Wherever the opponent has declined to avail himself of the opportunity to put his essential and material case in cross-examination, it must follow that he believed that the testimony given could not be disputed at all. It is wrong to think that this is merely a technical rule of evidence. It is a rule of essential justice. It serves to prevent surprise at trial and miscarriage of justice, because it gives notice to the other side of the actual case that is going to be made when the turn of the party on whose behalf the cross-examination is being made comes to give and lead evidence by producing witnesses.

[43] Learned defence counsel submits that the High Court did not adequately consider the appellant's defence. We beg to disagree. From p 20 to p 25 of the appeal record, the judgment of the High Court shows that the appellant's defence was considered at great length. And from p 25 to p 30 of the appeal record, the High Court analysed the appellant's defence meticulously and we see no reason to disagree with the analysis of the evidence undertaken by the High Court.

[44] The name of Ulaganathan was put to the prosecution witnesses by the defence. It must be recalled that the Modenas motorcycle WLF 6303 belonged to Ulaganathan. And efforts to trace Ulaganathan proved futile. It must also be recalled that the appellant testified that the drugs belonged to Ulaganathan. The High Court analysed the defence at p 28 of the appeal record in this manner:

> Walau bagaimanapun, sehingga ke tahap ini, tidak ada sesiapa yang memaklumkan kepada Mahkamah mengenai wujudnya Ulaganathan semasa tangkapan sehinggalah kes pembelaan dipanggil. Malah SD2 tidakpun berada di tempat kejadian, direka-reka untuk menjustifikasikan sebab tertuduh ke sana. Reaksi SD2 melihat sahaja tertuduh diserbu dan Ulaganathan melarikan diri adalah tidak selari dengan jalan cerita mereka yang melihatkan betapa akrabnya mereka sehingga sanggup memberi hutang RM4,000.00. Malahan tertuduh tidak langsung meminta tolong SD2 semasa ditangkap polis.

[45] Yet, learned counsel submits that the analysis by the High Court constitutes a misdirection. We beg to disagree. The learned judicial commissioner ('JC') Azman bin Abdullah (now judge) is entitled to analyse the evidence presented before His Lordship because analysis is part of adjudication and it is the duty of His Lordship to do so accordingly.

[46] A passage from the judgment of the High Court is read to us and

learned counsel submits that based on that passage the High Court has entered into the realm of speculation. That passage at p 27 of the appeal record reads as follows:

> Adalah juga sukar untuk diterima akal dan untuk menimbulkan keraguan di mana tertuduh sendiri yang tidak mempunyai sebarang kenderaan secara senang sahaja memberi pinjam RM4,000.00 untuk SD2 membayar ansuran kereta yang tertunggak. Begitu juga dengan SD3 majikannya memberi pinjam wang secara senang sahaja. Kalau benar nampak begitu kecil nilai bagi mereka RM4,000.00 ini kenapa tertuduh tidak pinjamkan duit bosnya untuk membeli kenderaan untuknya.

[47] The passage is not speculative. It is based on the evidence furnished by the defence and after considering those evidence the learned JC arrived at a finding of fact. His Lordship is entitled to come to that finding of fact. It is a speaking judgment and should be lauded and not criticised.

[48] In the petition of appeal, the appellant emphasised that the High Court had erred both in law and on the facts when the High Court held that the prosecution had succeeded in establishing a prima facie case notwithstanding the fact that the prosecution witnesses were not credible and there were doubts surrounding their evidence. In response we have this to say. This court as an appellate court, when confronted with a question of fact where the issues of credibility are involved are slow to interfere and would not interfere. The High Court would be in a far better position to weigh in a balance the trustworthiness of the prosecution witnesses bearing in mind that the learned JC having conduct of the trial had the opportunity of observing the demeanour of the prosecution witnesses. In any criminal trial, discrepancies will always be found in the evidence of any witnesses and this is quite common in our adversarial system. In a situation of this nature, the duty of the trial judge is to determine whether these discrepancies are minor or material. It is entirely within the domain of the trial judge to assess the credibility of each witness and arrive at a finding whether the evidence of a witness is to be believed or disbelieved. The trial judge too is empowered to determine which part of the evidence of a witness is to be accepted or rejected. Seen in this context, we are not inclined to substitute the findings of the learned JC. We are convinced that the learned JC is right (*Dato Mokhtar bin Hashim & Anor v Public Prosecutor* [1983] 2 MLJ 232; [1983] CLJ (Rep) 101 (FC); and *Pendakwa Raya lwn Muhd Zulkifli Abd Ghani & Satu Lagi* [2010] MLJU 1744; [2011] 2 CLJ 772 (CA)).

[49] We see no reason to doubt the credibility of the prosecution witnesses bearing in mind that no cogent reasons were advanced by the appellant to say otherwise. We are not convinced that the learned JC had formed a wrong opinion. We are convinced and justified on the evidence adduced to give effect

to the decision of the learned JC in calling the defence of the appellant (*Muniandy & Ors v Public Prosecutor* [1966] 1 MLJ 257 (FC)).

[50] It must be borne in mind that the prosecution witnesses are not interested witnesses and they do not have a motive nor would they benefit if they were to tell lies in court. Raja Azlan Shah FJ (as His Majesty then was) in *Public Prosecutor v Datuk Haji Harun bin Haji Idris (No 2)* [1977] 1 MLJ 15, at p 19 aptly said, and we adopt what His Majesty said vigorously in this ex tempore judgment. This was what His Majesty said in that case:

> I shall be almost inclined to think that if there are no discrepancies, it might be suggested that they have concocted their accounts of what had happened or what had been said because their versions are too consistent. The question is whether the existence of certain discrepancies is sufficient to destroy their credibility. There is no rule of law that the testimony of a witness must either be believed in its entirety or not at all. A court is fully competent, for good and cogent reasons, to accept one part of the testimony of a witness and to reject the other. It is, therefore, necessary to scrutinise each evidence very carefully as this involves the question of weight to be given to certain evidence in particular circumstances.

[51] We will now consider grounds 2, 3, 4 and 7 of the petition of appeal together. They concerned the conviction of the appellant for the offence of trafficking in dangerous drugs as per the charge. At the outset we must categorically say that the prosecution had proved its case beyond reasonable doubt against the appellant. In our judgment, the appellant had custody and control of the dangerous drugs at the material time and he too had knowledge of those drugs. In our judgment, the appellant failed to rebut the presumption under s 37(da) of the DDA on the balance of probabilities.

[52] The evidence of SP2 showed that the appellant was arrested with the drugs conveyed in the Modenas motorcycle. And the drugs were wrapped in the fashion as stipulated earlier and that by itself showed that the appellant had possession of the drugs which was in his custody and control. The drugs were under the appellant's care and he is the custodian of the drugs. The appellant knew that the black bag (exh 'P13') contained drugs and he had control over them. By necessary implication custody implies knowledge of the existence of the drugs in the black bag (exh 'P13') on the part of the appellant and he has the power of disposal over it.

[53] It must be borne in mind that SP2 observed the appellant riding the Modenas motorcycle for about 30 seconds with the black bag (exh 'P13') containing the drugs in the carrier basket of the said motorcycle. That itself shows that the appellant had custody and control of the drugs in question. At this juncture, we need to highlight two salient authorities. The first is the case

of *Warner v Metropolitan Police Commissioner* [1968] 2 All ER 356 (HL), at pp 375–376 where Lord Morris of Borth-y-Gest aptly said:

> If there is assent to the control of a thing, either after having the means of knowledge of what the thing is or contains or being unmindful whether there are means of knowledge or not, then ordinarily there will be possession. If there is some momentary custody of a thing without any knowledge or means of knowledge of what the thing is or contains — then, ordinarily, I would suppose that there would not be possession. If, however, someone deliberately assumes control of some package or container, then I would think that he is in possession of it. If he deliberately so assumes control knowing that it has contents, he would also be in possession of the contents. I cannot think that it would be rational to hold that someone who is in possession of a box which he knows to have things in it is in possession of the box but not in possession of the things in it. If he had been misinformed or misled as to the nature of the contents, or if he had made a wrong surmise as to them, it seems to me that he would nevertheless be in possession of them.

[54] The second is the case of *Public Prosecutor v Badrulsham bin Baharom* [1988] 2 MLJ 585, at p 589 where the late Lim Beng Choon J had this to say:

> Knowledge being an element of the state of mind of a person, the obvious question is: how is one to prove the element of knowledge in order to establish possession. However that may be, certain modes of proof are acceptable as sufficient to distinguish between a genuine and a feigned defence. Those modes of proof are acceptable because unless a defendant confesses that he has the necessary knowledge which is an element of his state of mind such element must be judged from his outward acts or omissions.

[55] There are no errors made by the learned JC. He had held that the appellant had actual possession of the drugs and so the compelling provision of s 37(da) of the DDA was invoked. The learned JC analysed the defence case and came to the conclusion that the appellant had failed to raise a reasonable doubt in the prosecution's case and the appellant also failed to rebut the presumption of trafficking under s 37(da) of the DDA on the balance of probabilities. It is safe to convict the appellant.

[56] We unanimously dismiss the appeal and we affirm the conviction and sentence on the appellant.

Appeal dismissed, conviction and sentence affirmed.

Reported by Ashgar Ali Ali Mohamed